

1 WO
2
3
4
5

6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

8
9 Tammy Bernal,

No. CV-20-08040-PCT-SMB

10 Plaintiff,

ORDER

11 v.

12 Commissioner of Social Security
13 Administration,

14 Defendant.

15 At issue is the denial of Plaintiff Tammy Bernal's Applications for Social Security
16 Disability Insurance ("SSDI") and Supplemental Security Income ("SSI") benefits by the
17 Social Security Administration ("SSA") under the Social Security Act ("the Act").
18 Plaintiff filed a Complaint (Doc. 1) seeking judicial review of that denial and an Opening
19 Brief (Doc. 22). Defendant SSA filed an Answering Brief (Doc. 26), and Plaintiff filed a
20 Reply (Doc. 27). The Court has reviewed the briefs and Administrative Record ("AR")
21 (Doc. 19), and it affirms the Administrative Law Judge's ("ALJ") decision (AR at 13-22)
22 for the reasons addressed herein.

23 **I. Background**

24 Plaintiff filed Applications for SSDI and SSI benefits on August 4, 2016, alleging
25 an onset of disability date of August 1, 2015. (AR 13). Plaintiff's claims were initially
26 denied on November 8, 2016, and upon reconsideration on August 4, 2017. (*Id.*) A hearing
27 was held before ALJ Guy E. Fletcher on March 14, 2019. (*Id.* at 28-53). Plaintiff was 51
28 years old at the time of the hearing and held relevant previous employment as a

1 telemarketer and telemarketer supervisor. (*Id.*) Plaintiff's Applications were denied in a
 2 decision by the ALJ on April 10, 2019. (*Id.* at 22). Thereafter, the Appeals Council denied
 3 Plaintiff's Request for Review of the ALJ's decision and this appeal followed. (Doc. 1).

4 After considering the medical evidence and opinions, the ALJ evaluated Plaintiff's
 5 disability claim based on the severe impairments of chronic obstructive pulmonary disease
 6 ("COPD"), peripheral neuropathy, and obesity. (AR 15). While the ALJ noted that
 7 Plaintiff's severe impairments limited her ability to perform basic work activities, the ALJ
 8 determined that Plaintiff had the residual functional capacity ("RFC") to perform a range
 9 of light work and thus was not disabled. (*Id.* at 18-22).

10 The sole issue Plaintiff raises on appeal is whether the ALJ erred in failing to give
 11 clear and convincing reasons to discount her subjective symptom testimony. (Doc. 20).
 12 The Commissioner argues that the ALJ's opinion is free of harmful error and must be
 13 affirmed. (Doc. 26). The Court has reviewed the medical record and will discuss the
 14 pertinent evidence in addressing the issues raised by the parties.

15 **II. Legal Standards**

16 An ALJ's factual findings "shall be conclusive if supported by substantial
 17 evidence." *Biestek v. Berryhill*, 139 S. Ct. 1148, 1153 (2019). The Court may set aside
 18 the Commissioner's disability determination only if it is not supported by substantial
 19 evidence or is based on legal error. *Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007).
 20 Substantial evidence is relevant evidence that a reasonable person might accept as adequate
 21 to support a conclusion considering the record as a whole. *Id.* Generally, "[w]here the
 22 evidence is susceptible to more than one rational interpretation, one of which supports the
 23 ALJ's decision, the ALJ's conclusion must be upheld." *Thomas v. Barnhart*, 278 F.3d 947,
 24 954 (9th Cir. 2002) (citations omitted). Whether the Commissioner's decision is supported
 25 by substantial evidence "is a highly deferential standard of review." *Valentine v. Comm'r
 26 of Soc. Sec.*, 574 F.3d 685, 690 (9th Cir. 2009). In determining whether to reverse an ALJ's
 27 decision, the district court reviews only those issues raised by the party challenging the
 28 decision. *See Lewis v. Apfel*, 236 F.3d 503, 517 n.13 (9th Cir. 2001).

1 To determine whether a claimant is disabled for purposes of the Act, the ALJ
2 follows a five-step process. 20 C.F.R. § 404.1520(a). The claimant bears the burden of
3 proof on the first four steps, but the burden shifts to the Commissioner at step five. *Tackett*
4 *v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). At the first step, the ALJ determines whether
5 the claimant is presently engaging in substantial gainful activity. 20 C.F.R.
6 §404.1520(a)(4)(i). At step two, the ALJ determines whether the claimant has a “severe”
7 medically determinable physical or mental impairment. 20 C.F.R. § 404.1520(a)(4)(ii). At
8 step three, the ALJ considers whether the claimant’s impairment or combination of
9 impairments meets or medically equals an impairment listed in Appendix 1 to Subpart P
10 of 20 C.F.R. Part 404. 20 C.F.R. § 404.1520(a)(4)(iii). If so, the claimant is automatically
11 found to be disabled. *Id.* At step four, the ALJ assesses the claimant’s RFC and determines
12 whether the claimant is still capable of performing past relevant work. 20 C.F.R.
13 § 404.1520(a)(4)(iv). If not, the ALJ proceeds to the fifth and final step, where she
14 determines whether the claimant can perform any other work in the national economy
15 based on the claimant’s RFC, age, education, and work experience. 20 C.F.R.
16 § 404.1520(a)(4)(v). If not, the claimant is disabled. *Id.*

17 **III. Analysis**

18 The sole issue Plaintiff raises on appeal is the ALJ’s discussion of her symptom
19 testimony. Plaintiff argues that the ALJ did not provide clear and convincing reasons to
20 discount her subjective symptom testimony. (Doc. 20). Specifically, Plaintiff argues that
21 the ALJ “did not provide one legitimate reason” to discount her testimony, and therefore,
22 that the Court should remand this matter for an award of benefits. (Doc. 20 at 10). The
23 Commissioner argues that the ALJ properly examined the medical evidence to determine
24 that the record did not support Plaintiff’s testimony as to the severity of her symptoms.
25 (Doc. 26).

26 An ALJ must evaluate whether the claimant has presented objective medical
27 evidence of an impairment “which could reasonably be expected to produce the pain or
28 symptoms alleged.” *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035–36 (9th Cir. 2007)

1 (quoting *Bunnell v. Sullivan*, 947 F.2d 341, 344 (9th Cir. 1991) (*en banc*) (internal citations
 2 omitted)). In evaluating a claimant’s pain testimony after a claimant produces objective
 3 medical evidence of an underlying impairment, “an ALJ may not reject a claimant’s
 4 subjective complaints based solely on a lack of medical evidence to fully corroborate the
 5 alleged severity of pain.” *Burch v. Barnhart*, 400 F.3d 676, 682 (9th Cir. 2005). However,
 6 the ALJ may “reject the claimant’s testimony about the severity of [the] symptoms”
 7 provided that the ALJ also explains his decision “by providing specific, clear, and
 8 convincing reasons for doing so.” *Brown-Hunter v. Colvin*, 806 F.3d 487, 488–89 (9th Cir.
 9 2015). The ALJ may also consider ““whether the claimant engages in daily activities
 10 inconsistent with the alleged symptoms.”” *Id.* (quoting *Lingenfelter v. Astrue*, 504 F.3d
 11 1028, 1040 (9th Cir. 2007)). “Even where those activities suggest some difficulty
 12 functioning, they may be grounds for discrediting the claimant’s testimony to the extent
 13 that they contradict claims of a totally debilitating impairment,” *Id.* at 1113, or where they
 14 suggest that “later claims about the severity of [the] limitations were exaggerated,”
 15 *Valentine v. Astrue*, 574 F.3d 685, 694 (9th Cir. 2009).

16 Plaintiff testified that she had sharp and constant stabbing pain in her feet that made
 17 it difficult to walk more than twenty feet. (AR 33). Plaintiff stated that she lays down two
 18 to three times per day to alleviate pain and swelling in her feet. (*Id.* at 37). Plaintiff testified
 19 that she took medication to alleviate symptoms, but that the medication caused dizziness
 20 and difficulty with balance. (*Id.* at 35, 41). Moreover, Plaintiff testified that she wore
 21 special shoes that alleviated some pain. (*Id.* at 33). Plaintiff argues that these impairments
 22 prevent her from performing any work.

23 Plaintiff argues that the ALJ discounted her symptoms without providing a legal
 24 basis for doing so. She argues that the ALJ did not provide any link between medical
 25 evidence and his findings, “leaving this Court to guess at which findings are the basis of
 26 rejecting the symptom testimony.” (Doc. 20 at 8). The Court does not agree.

27 The ALJ found that Plaintiff’s medically determinable impairments could
 28 reasonably be expected to produce the symptoms alleged, but that her statements

1 concerning the intensity, persistence, and limiting effects of those symptoms were not
2 consistent with the medical evidence, including her own statements and testimony
3 regarding activities of daily living. (AR 19).

4 To support this finding, the ALJ cited to a number of specific medical records. As
5 an initial matter, the ALJ recognized that the record contained evidence of Plaintiff's
6 COPD, peripheral neuropathy, and obesity. (*Id.*) However, the ALJ found that the record
7 showed mostly normal physical examinations and symptom management. For instance,
8 the ALJ cited numerous records related to Plaintiff's COPD, including references to the
9 condition being "mild," with normal levels of oxygen saturation, and no evidence of
10 cardiopulmonary disease. (AR 19; citing 294, 338-39, 363-64, 392). While Plaintiff
11 occasionally appeared with shortness of breath, physician notes indicate that this was
12 consistent with her heavy tobacco usage since she was 12 years old. (*Id.* at 329; 354, 363,
13 372, 378, 391). The ALJ discussed that at other visits, she presented with normal breathing,
14 no wheezing, and normal lung function. (*Id.* at 294, 330, 354, 378). Therefore, the ALJ
15 concluded that Plaintiff's COPD symptoms were less severe than alleged. In doing so, he
16 cited to many specific examples from the medical record, including to records that
17 confirmed that Plaintiff was experiencing some symptoms from this impairment.

18 As to Plaintiff's neuropathy, Plaintiff argues in her Opening Brief that this condition
19 is "the most severe and limiting" of her impairments. (Doc. 20 at 8). She argues that the
20 ALJ did not give adequate reasons to discount her symptoms. Here, the ALJ discussed
21 records showing that Plaintiff consistently exhibited normal vibratory sensations and
22 position sense. (AR 294, 331). The ALJ also discussed numerous records which showed
23 largely normal physical examinations, including ordinary motor function in the lower and
24 upper extremities and no limitations in the ability to stand, balance while walking, or using
25 upper extremities. (AR 294, 331, 354, 359, 364, 372, 378, 400). The ALJ concluded that
26 these findings in the medical record were not consistent with the symptoms alleged.

27 Plaintiff also argues that it was improper for the ALJ to comment on the fact that
28 her physicians did not order additional testing or suggest more aggressive treatment for her

1 neuropathy. (Doc. 20 at 8). Plaintiff posits that her poor medical care and location in a
 2 rural community is to blame for a lack of additional treatment. (*Id.*) Contrary to Plaintiff's
 3 arguments here, the ALJ can properly consider the types of treatment a claimant is
 4 receiving to determine whether her symptom testimony is credible. *See Parra v. Astrue*,
 5 481 F.3d 742, 751 (9th Cir. 2007) ("[E]vidence of conservative treatment is sufficient to
 6 discount a claimant's testimony regarding severity of an impairment.") (internal quotations
 7 and citation omitted). An ALJ is also free to consider the amount of treatment a claimant
 8 receives for an impairment in determining the nature and severity of the impairment, as
 9 well as medication and any other measures used. 20 C.F.R. §§ 404.1529(c)(3)(iv)–
 10 404.1529(c)(3)(vi). The Court finds no error here.

11 Lastly, Plaintiff argues that the ALJ did not cite to medical records that conflicted
 12 with Plaintiff's symptom testimony. Plaintiff argues that the opinions of Dr. Bendheim, a
 13 consultive examiner, found that Plaintiff had difficulty toe walking, was unable to do a full
 14 squat, and had stocking distribution decrease to light touch and temperature. (AR 331).
 15 She argues this opinion supports her symptom testimony. However, the ALJ gave only
 16 partial weight to this opinion and did not adopt its opined limitations. As Plaintiff does not
 17 argue that the ALJ erred in the consideration of Dr. Bendheim's opinion, the Court will not
 18 consider this argument. *See Kim v. Kang*, 154 F.3d 996, 1000 (9th Cir. 1998) ("[The Court]
 19 will not ordinarily consider matters on appeal that are not specifically and distinctly argued
 20 in appellant's opening brief.").

21 Lastly, the ALJ considered Plaintiff's testimony that she stopped working not
 22 because of her medical impairments, but rather because she was laid off. (AR 20). The
 23 ALJ's statement that this suggests a non-medical reason for applying for benefits, while on
 24 its own may be problematic, is not error here. For starters, the ALJ gave multiple legitimate
 25 reasons based on substantial evidence in the record to reach his conclusion as to Plaintiff's
 26 symptom testimony. Importantly, Plaintiff herself admitted that she left her work because
 27 she was laid off as a result of the business closing. (*Id.*) It was not improper for the ALJ
 28 to discuss Plaintiff's own testimony on the subject.

1 The ALJ properly and thoroughly concluded that the examinations in the medical
2 record did not support Plaintiff's claims of disabling limitations, and therefore, properly
3 found that her subjective symptom testimony was not persuasive. While Plaintiff may see
4 this evidence in a different light, the Court cannot second-guess the findings of the ALJ
5 when there is no error in the discussion of the symptom testimony. *See Thomas*, 278 F.3d
6 at 954 ("[w]here the evidence is susceptible to more than one rational interpretation, one
7 of which supports the ALJ's decision, the ALJ's conclusion must be upheld."). The Court
8 finds that the ALJ provided specific, clear, and convincing reasons for discounting
9 Plaintiff's symptom testimony. *See Brown-Hunter*, 806 F.3d at 488–89.

10 **IV. Conclusion**

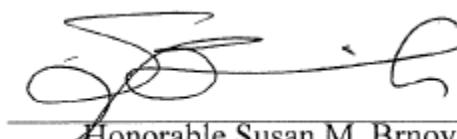
11 The Court finds that substantial evidence supports the ALJ's nondisability
12 determination. The ALJ properly discounted Plaintiff's symptom testimony by providing
13 specific, clear, and convincing reasons supported by substantial evidence. Therefore, the
14 Court finds that the ALJ did not err in his decision, which is based on substantial evidence.
15 *See Orn*, 495 F.3d at 630.

16 Accordingly,

17 **IT IS HEREBY ORDERED** that the decision of the ALJ is **affirmed**. The Clerk
18 of Court is directed to enter judgment accordingly and dismiss this action.

19 Dated this 8th day of February, 2022.

20
21
22
23
24
25
26
27
28



Honorable Susan M. Brnovich
United States District Judge